IN THE SUPREME COURT OF THE UNITED STATES.

Oscar Thornton, Shabic Thornton, Inman Thornton, Wesley McDonald, Waverly McDonald and Tinker Carroll, Petitioners. vs. United States of America, Respondent.	Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF OF COUNSEL FOR PETITIONERS.

Inasmuch as all of the essential facts are stated in the petition for certiorari, it is not necessary to restate them here. An examination of the assignment of errors (record p. 104 et seq.) will show that the following questions were presented to the Circuit Court of Appeals for decision and are here involved:

1. Were the employees of the Bureau of Animal Industry of the United States Department of Agriculture, whose names are set out in the indictment, charged under the law with the duty of supervising and causing to be dipped cattle in Echols County, Georgia, for the purpose of preventing the spread of splenetic fever among cattle, and in order to eradicate from tick infested cattle in said county what is commonly known as the cattle fever tick?

2. Is the Act of Congress, approved May 29th, 1884, entitled "An Act for the Establishent of a Bureau of Animal Industry," etc., constitutional?

3. If said Act is constitutional, does it, when properly construed, confer upon the United States Department of Agriculture authority to employ agents of the Bureau of

Animal Industry in the disinfection and quarantine of domestic cattle not moving or intended to be moved in interstate commerce?

4. Did the indictment contain sufficient allegations to bring it within the provisions of the Act of Congress of May 29, 1884, supra, and especially section 3 thereof, the indictment not alleging that the State of Georgia ever accepted the rules and regulations for the suppression and extirpation of infectious, contagious and communicable diseases of live stock prepared by the Secretary of Agriculture, and by him certified to the executive authority of the State, or that plans and methods for the suppression and extirpation of said diseases heretofore adopted by the State of Georgia had been accepted by the Secretary of Agriculture, and there being no allegation that the Governor, or other properly constituted authority of said State, had signified a readiness to co-operate for the extinction of contagious diseases described in the Act?

The indictment charges that in the year 1920, the twenty-one defendants named therein, in the County of Echols, entered into a conspiracy to commit an offense against the United States; that the offense which they conspired to commit was the unlawful, willful and knowing use of deadly and dangerous weapons for the purpose of deterring and preventing nine named employees of the Bureau of Animal Industry of the United States Department of Agriculture from discharging their duties as such employees, which said employees were then and there charged with the duty of **supervising the dipping of and causing to be dipped cattle,** in order to prevent the spread of splenetic fever. The overt acts charged in the first count were: (1) The shooting at and toward the employees of the Bureau of Animal Industry by the six defendants who were found guilty, it being alleged that such employees of the Bureau were encamped for the night and were then and there engaged in the performance of their duties as such employees, which, of course, refers to the duty of supervising the dipping of and causing to be dipped cattle; (2) The killing of Max Lockridge, and

the wounding of Roy Richey, two of the employees of the Bureau, by Mann Carter and Will Carter, two of the defendants, which said employees were engaged in the discharge of their duties as such, to-wit: The supervising the dipping of and causing to be dipped cattle; (3) The commission of an assault and battery upon W. D. Counts by three of the defendants (who were not convicted), the said Counts being one of the employees of the Bureau, who was engaged in the discharge of his duties as such; and (4) The shooting at John Loftin, Jr., and Frank Peterson, who are alleged to be employees of the Bureau (but were not such in fact), by eight of those named in the indictment, which said alleged employees were at the time engaged in guarding a dipping vat in Echols County.

The overt acts charged in the second count were: (1) The dynamiting of several dipping vats, and the destruction by fire of other vats; and (2) The burning of certain cattle spray pens.

It will, therefore, be observed that the duties which the nine employees of the Bureau of Animal Industry were performing in Echols County, Georgia, were duties incident to the systematic work of disinfecting the cattle in that county, said work of disinfection being carried on under the supervision of and by compulsion of those nine employees, and consisting of the dipping and spraying of cattle, which were domestic property of the citizens of that county and which were in no way the subjects of interstate commerce. Section 3 of the Act of Congress of May 29, 1884, entitled "An Act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals," is the portion of the Act by virtue of which it is insisted by the Government that the employees of the Bureau were in Echols County and were engaged in the work of supervising the dipping of and causing to be dipped cattle, in order to prevent the spread of splenetic fever among cattle, and in order to eradicate from tick infested animals what is commonly known as the cattle fever tick. That

section, read in the light of the entire Act, plainly has as its purpose co-operation with the State authorities on the part of the Bureau in an advisory way, in so far as the work of extirpating the cattle tick from domestic animals is concerned. The Commissioner of Agriculture was charged with the duty of investigation, the compilation of statistics, and the ascertainment of the causes and the cures for contagious diseases among domestic animals, and with the duty of passing this information on to the State authorities. He was further charged with the duty of assisting the State authorities in an advisory capacity in the work of extirpating the cattle tick and other contagious diseases among domestic animals. So long as a contagious disease was confined to the cattle of one particular state, and the work to be done was simply the extirpation of the cattle tick upon the domestic cattle of that State, this Act and all other Acts of Congress could give no authority to the employees of the Bureau of Animal Industry to engage in the work of supervising the dipping of and causing cattle to be dipped. To do so would be a palpable invasion of the rights of the states, and the employees of the Bureau would be engaged in a work which was peculiarly within the scope of the duties of the State agents.

Section 3 provides that the Commissioner of Agriculture shall prepare rules and regulations as his investigation indicates will be effective for the suppression and extirpation of infectious and contagious diseases among cattle, and he is charged with the duty of certifying these rules and regulations to the executive authorities of the States, and of inviting the executive authorities to co-operate in the enforcement and execution of these rules. That section also provides that when the plans of the Commissioner shall have been accepted by any particular State, or when any particular State formulates plans of its own and said plans and methods are acceptable to him, and the Governor of the State signifies his readiness to co-operate with the Commissioner for the extirpation of any contagious disease among cattle, the said **Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by**

this Act as may be necessary in such investigation and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one state or territory into another. The legislative intent is clearly indicated by the last few words of the section. The Commissioner of Agriculture was authorized to spend the money on a thorough investigation of the causes and cures of contagious diseases among cattle. He was, however, authorized to spend said appropriation in measures of disinfection and quarantine only when any particular disease was to be confined within any particular State.

Section 5 of the Act approved March 3, 1905, entitled "An Act to enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes," (Penal Code, section 62) provides a penalty for any interference with any officer or employee of the Bureau of Animal Industry **in the execution of his duties, or on account of the execution of his duties.** It was under section 3 of the Act of May 29, 1884, and section 5 of the Act of March 3, 1905, that the defendants were indicted and tried, and the very essence of the offense is the charge that the employees of the Bureau of Animal Industry who were interfered with were, at the time of said interference, lawfully engaged in a duty with which they were lawfully charged, and that duty in which they were engaged was, according to the allegations of the indictment, the supervising the dipping of and causing to be dipped cattle in Echols County. Not one word in the indictment indicates that the work they were doing was necessary to prevent the spread of contagious diseases from one State into another. The indictment does not charge that the cattle which were being dipped had become the subjects of, or were even intended for interstate commerce.

It would appear from one of the allegations in the indictment that the nine employees who had organized a camp known as Camp McKinnon, in the heart of Echols County, were engaged in the dipping of, and were by compulsion causing the citizens of the county to dip their cattle, not

for the purpose, in so far as the indictment discloses, of preventing the spread of disease from one state to another, but, according to the allegations made, to prevent the spread of splenetic fever among cattle—that is, among cattle in Echols County, and, as the indictment further alleged, "in order to eradicate and remove from tick infested animals what is commonly known as the cattle fever tick." There is nothing in the Act establishing the Bureau of Animal Industry which charges the employees of the Bureau with the performance of the duties which the indictment alleged they were performing at the time the overt acts are alleged to have been committed. If the employees of the Bureau were in Echols County using compulsion and force (and the word "causing" implies that) to require the citizens of that county to dip their cattle, they were engaged in the work of usurpation of authority and of tyranny, and it was not the intention of Congress in passing the Act of March 3, 1905, to **penalize the lawful resistance to the exercise of unlawful authority.** If, by the Act of May 29, 1884, establishing a Bureau of Animal Industry, it was the intention of Congress to confer upon the Secretary of Agriculture authority to send agents and employees of the Bureau into the borders of any State in the Union and empower them to supervise the dipping and by compulsion and force cause cattle to be dipped, the Act must be held unconstitutional and void. In this connection we respectfully ask a careful consideration of the following cases which are, in our opinion, controlling upon that question:

128 U. S. 1, Kidd vs. Pearson.
85 Fed. 425, U. S. vs. Boyer.
154 U. S. 210, Covington, etc. Bridge Co. vs. Kentucky.
10 Wall. 557, In re: The Daniel Ball.
116 U. S. 517, Coe vs. Errol.
52 Fed. 113, In re: Greene.
9 Wheat. 1, Gibbons vs. Ogden.

In Kidd vs. Pearson, 128 U. S. 1, supra, Mr. Justice Lamar said:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufactures and commerce. Manufacture is transformation,—the fashioning of raw materials into a change of form for use. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation, at least, of such transportation. The legal definition of the term as given by this court in County of Mobile vs. Kimball, 102 U. S. 691, 702, is as follows: 'Commerce with foreign nations and among the states, strictly considered, consist in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities.' If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining — in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in congress, and denied to the states, it would follow as an inevitable result, that the duty would devolve on congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are, and must be, local in all the details of their successful management. It is not necessary to enlarge on, but only to suggest, the impracticability of such a scheme, when we regard the multitudinous affairs involved and the almost infinite variety of their minute details."

While the decision in the United States vs. Boyer, supra, was by a District Judge, it is quite evident that the learned juris who passed on that case made a careful study of

the question there presented and which is directly involved in the instant case. He concluded: (a) That the crime of bribery could not be predicated upon the offer of a reward not to perform duties for the performance of which there was no legal or constitutional warrant; and (b) That the killing of cattle and the preparation of their carcasses for shipment in interstate commerce was not interstate commerce, and that the employees of the Bureau of Animal Industry engaged in the work of inspecting cattle which had been slaughtered and were being packed preparatory to being shipped in interstate commerce were not engaged in the performance of duties of inspection legally conferred upon them, and that the Act of Congress found in 1st Supp. Rev. St. 937, and 2nd Supp. Rev. St. 403, whereby the Secretary of Agriculture was empowered to have made a careful inspection of cattle, sheep and hogs at slaughter houses located in the several states, which were about to be slaughtered, the products of which were intended for sale in other states or foreign countries, was unconstitutional.

We take it that no one will seriously contend that the power claimed in this case was conferred upon Congress by the general welfare clause of the Constitution, because it contains no power of itself to enact any legislation, but according to the most liberal view is only a limitation on the taxing power of the United States. Does the power then "to regulate commerce with foreign nations and among the several states and with the Indian tribes" embrace the power to send inspectors within a state to supervise the dipping of and cause cattle to be dipped when they are not subjects of interstate commerce, or intended for interstate commerce? Most assuredly not.

If it was the intention of Congress to confer by the Act of May 29, 1884, authority upon the agents and employees of the Bureau of Animal Industry to go within the borders of a state and supervise the dipping of and cause cattle to be dipped, irrespective of whether or not they were the subjects of interstate commerce, the Act is void. In Illinois Central vs. McKendree, 203 U. S. 514, it was held:

"Quarantine regulations promulgated by the Secretary of Agriculture acting under cover of the Act of February 2, 1903, entitled 'An Act to Enable the Secretary of Agriculture to More Effectually Suppress and Prevent the Spread of Contagious and Infectious Diseases of Live Stock, and for Other Purposes,' are void as in excess of the powers conferred by that act, where, on their face, they apply as well to intrastate as to interstate commerce."

The game laws enacted by Congress for the protection of migratory birds were declared unconstitutional on the theory that game within the borders of a state is domestic property.

214 Fed. 154, U. S. vs. Shauver.
221 Fed. 288, U. S. vs. McCullagh.

The Federal Employers Liability Act was declared unconstitutional because Congress had no power to regulate matters purely intrastate.

207 U. S. 463, Howard vs. Illinois Central R. Co.

Decisions of this Court declaring the Civil Rights Act unconstitutional have a direct bearing upon the questions here involved.

109 U. S. 3, Roberson vs. Memphis, etc. R. Co.
230 U. S. 125, Butts vs. Merchants & Miners Trans. Co.

The Federal Futures Trading Act was declared unconstitutional because there was no limitation of the application of the tax to interstate commerce.

259 U. S. 44, Hill vs. Wallace.

It is a fundamental principle that the legislative powers of Congress are limited by constitutional grants of the States, and that all governmental powers which are not conferred upon the United States by the Constitution are reserved to the States. Domestic cattle within the State of

Georgia, feeding upon the ranges and farms of the citizens, are domestic property. In the indictment it is alleged that the employees of the Bureau of Animal Industry were in Echols County engaged in the work of "supervising the dipping of and causing to be dipped cattle." The compulsion which they were exercising by virtue of their assumed authority seems to have caused resentment and resistance on the part of the citizens. This resistance, which flared up into overt acts, constitute alleged violations of section 62 of the Penal Code. To be said to be in performance of their duties as such employees of the Bureau of Animal Industry is equivalent to saying that their presence in said county and the compulsion they were exercising upon the citizens thereof was by virtue of authority vested in them as Federal employees, and yet at the time of the commission of the overt acts they were operating under and by virtue of the authority vested in them as agents for the State of Georgia, and the resistance of the citizens was resistance to the authority of the State in the enforcement of the State Wide Tick Eradication Act, approved August 17th, 1918 (Georgia Laws 1918, p. 256). A study of the State Wide Tick Eradication Act of the State of Georgia, supra, and an examination of the evidence will show that the duties, in the performance of which the agents of the Bureau of Animal Industry were engaged at all of the times mentioned and referred to in the indictment, were duties expressly conferred upon, and with which State inspectors were charged, by the State law, and not duties with which they were charged as employees of the Bureau of Animal Industry.

But if the Act of May 29, 1884, is susceptible of two constructions, by one of which it may be held constitutional and valid, and by the other it must be held unconstitutional and void, it is the duty of the Court to place upon it that construction which will uphold it as constitutional and valid. We deem it unnecessary to cite authority in support of this proposition, which is elementary. The Act is not unconstitutional unless the only reasonable construction which can be put upon it is a construction which confers upon the em-

ployees of the Bureau of Animal Industry authority to supervise the dipping of and causing cattle to be dipped within the States, regardless of whether or not such cattle are the subjects of interstate commerce. The Act itself, properly construed, does not give to such employees any authority to enforce the disinfection and quarantine measures except where animals are subjects of interstate commerce.

47 Fed. 833, U. S. vs. Gibson.

The questions which we have discussed above were raised by the demurrer to the indictment (Record p. 9), by objections to the admission of evidence (Record p. 70), and by exceptions to the charge of the Court (Record pp. 93-96). The only question that remains is whether or not the allegations of the indictment were sufficient to bring it within the provisions of the Act of May 29, 1884, to which we have so often referred.

In the case of The Abby Dodge vs. United States, 223 U. S. 166 (4), it was held:

> "A libel charging a vessel with violating the Act of June 20th, 1906, by landing at a Florida port sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico, or Straits of Florida, **must negative** the fact that the sponges may have been taken from waters within the territorial limits of a state."

In this connection see also:

195 Fed. 980, U. S. vs. Birdsall.
48 Fed. 554, U. S. vs. Baird.
267 Fed. 603, U. S. vs. Pittoto.
271 Fed. 795, U. S. vs. Hallowell.
277 Fed. 459, U. S. vs. Page, et al.

There is no allegation in the indictment that any rules and regulations prepared by the Secretary of Agriculture of the United States for the suppression and extirpation of infectious, contagious and communicable diseases among live

stock had been certified to the executive authority of the State of Georgia and accepted, or that the plans and methods adopted by the State of Georgia (Ga. Laws 1918, p. 256) for that purpose had been accepted by the Secretary of Agriculture of the United States. Therefore, the indictment did not show any authority in the employees of the Bureau of Animal Industry to engage or participate in the work of systematic tick eradication in Georgia.

The Circuit Court of Appeals affirmed the judgment of conviction on the theory that, inasmuch as the County of Echols in which the employees of the Bureau of Animal Industry were alleged to be engaged, is bounded on the south by a county in the State of Florida, "the supervision of the cattle complained of had a direct tendency to prevent the spread of disease into another State." If the acts of the agents and employees of the Bureau of Animal Industry can be declared to be legal on any such theory, it could as plausibly be contended that they could enter a county in the center of Georgia and exercise the same authority, on the theory that the cattle in that county would have a direct tendency to communicate a contagious disease to the cattle of an adjoining county, and that it would spread from county to county until it reached the State line. If such is the law of this country, the citizens cannot longer boast of State rights, in so far as domestic property is concerned.

We call attention to the further fact that in rendering the decision complained of, the Circuit Court of Appeals assumed that the county in Florida adjacent to Echols County was tick free, when in point of fact it was not. That Court could not take judicial cognizance of a fact which did not exist.

The questions presented are questions of gravity and importance, and, until they are definitely settled, they will arise as often as the Bureau of Animal Industry undertakes to actively engage in the work of systematic tick eradica-

tion within the states. We insist that the petition for certiorari should be granted as prayed.

Respectfully submitted.

E. K. WILCOX,
OMER W. FRANKLIN,
Attorneys for Petitioners.

E. K. WILCOX,
OMER W. FRANKLIN,
HARLEY LANGDALE,
JOHN W. BENNETT,
L. W. BRANCH,
RUSSELL SNOW,
Of Counsel.

In the Supreme Court of the United States
October Term, 1925

No. 255

OSCAR THORNTON, SHABIE THORNTON, INMAN THORNTON *et al.*, *Petitioners*,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF COUNSEL FOR PETITIONERS.

JOHN W. BENNETT,
OMER W. FRANKLIN,
L. W. BRANCH,
E. K. WILCOX,
Attorneys for Petitioners.

SUBJECT INDEX

TABLE OF CASES

In the Supreme Court of the United States
October Term, 1925

OSCAR THORNTON *et al., Petitioners,*

vs.

THE UNITED STATES OF AMERICA.

No. 255

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF COUNSEL FOR PETITIONERS.

OFFICIAL REPORT OF OPINION.

The judgment of the trial Court in this case was not officially reported. The opinion of the United States Circuit Court of Appeals for the Fifth Circuit is officially reported in 2 Fed. (2nd series), 561.

GROUNDS ON WHICH JURISDICTION INVOKED.

The petitioners were tried and convicted in the United States District Court for the Southern District of Georgia on an indictment containing two counts, in which they were charged with conspiracy to violate Section 62 of the Penal Code. The verdict was returned and judgment entered thereon March 12th, 1924 (R. 11-12). A six months' jail sentence was imposed on each of them. The judgment of the

Circuit Court of Appeals affirming the judgment of conviction was entered November 5th, 1924 (R. 64-66). The writ of certiorari was granted by this Court on March 9th, 1925 (R. 66). By their demurrer to the indictment (R. 5-11), by exception to the admission in evidence of a contract between the Chief of the Bureau of Animal Industry of the United States Department of Agriculture and the State Veterinarian for the State of Georgia (R. 38-40), and by exception to certain instructions given by the Court to the jury (R. 58-60), the petitioners raised the following questions:

1. Is the Act of May 29th, 1884, 23 Stat., sec. 32, U. S. Comp. Stat., sec. 8691, entitled "An Act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle and to provide means for the prevention and extirpation of pleuro-pneumonia and other contagious diseases among domestic animals," constitutional?

2. If said Act is constitutional, does it, when properly construed, confer upon the United States Department of Agriculture authority to employ armed agents of the Bureau of Animal Industry in the disinfection and quarantine of domestic cattle in a county in Georgia, not moving or intended to move in interstate commerce, and charge such employees with the duty of supervising the dipping of and causing to be dipped such cattle under the provisions of the State-wide Tick Eradication Act?

3. Were the agents of the Bureau of Animal Industry named in the indictment charged as such by law with the duty of supervising and causing to be dipped domestic cattle in Echols County, Georgia, for the purpose of preventing the spread of splenetic fever, and in order to eradicate from tick infested cattle what is commonly known as the cattle fever tick?

4. Has the Legislature of Georgia the right by the enactment of a statute to confer upon a department of the Federal Government, or its agents, powers not given to the Federal Government by the Constitution?

5. Has the State Veterinarian for the State of Georgia the right by contract to empower the agents of a department of the Federal Government to assist the officers of the State in enforcing the State-wide Tick Eradication Act, and if such agents undertake to co-operate with the State officers in the enforcement of the State law, can they be said to be lawfully engaged in the performance of duties with which they are charged as agents of the Bureau, and entitled to the protection of the penal provisions of the Federal law enacted for the protection of agents and officers of the Government engaged in the discharge of their duties as such?

6. Did the indictment contain sufficient allegations to bring it within the provisions of the Act of Congress of May 29th, 1884, supra, and especially section three thereof, the indictment not alleging that the State of Georgia ever accepted the rules and regulations for the suppression and extirpation of infectious, contagious and communicable diseases of live stock prepared by the Secretary of Agriculture, and by him certified to the executive authority of the State, or that plans and methods for the suppression and extirpation of such diseases heretofore adopted by the State of Georgia had been accepted by the Secretary of Agriculture, and there being no allegation that the Governor, or other properly constituted authority of said State, had signified a readiness to co-operate for the extinction of contagious diseases described in the Act?

The demurrer was overruled by the Court (R. 11), the contract between the State Veterinarian and the Chief of the Bureau of Animal Industry was admitted in evidence over what we claim was a valid objection (R. 40), and exceptions to certain instructions to the jury were noted and allowed (R. 53-54). Upon said rulings and instructions assignments of error which raise the above questions are made (R. 57-60).

This Court has taken jurisdiction of the case by granting a petition for certiorari pursuant to Jud. Code, sec. 128 (Comp. Stat., sec. 1120, 26 Stat., 828), and Jud. Code, sec. 240 (Comp. Stat., sec. 1217, 26 Stat., 828). The judgment of the Circuit

Court of Appeals is made final by Jud. Code, sec. 128, and the right of certiorari is given by Jud. Code, sec. 240. The construction and constitutionality of a statute of the United States is involved, Jud. Code, sec. 238 (Comp. Stat., sec 1215, 26 Stat., 827).

STATEMENT OF THE CASE.

Twenty-one defendants, including the petitioners, were tried on an indictment charging in two counts a conspiracy to commit an offense against the United States, in that they did unlawfully, willfully and knowingly use deadly and dangereus weapons for the purpose of deterring and preventing nine named employees of the Bureau of Animal Industry of the United States Department of Agriculture from discharging their duties as such employees, the said employees being then and there charged with the duty of supervising the dipping of and causing to be dipped cattle in order to prevent the spread of splenetic fever among cattle, and in order to remove from tick infested animals what is commonly known as the cattle fever tick. In the first count of the indictment four overt acts were charged, all of which it was alleged were in the use of deadly and dangerous weapons (R. 1-4). The second count also stated substantially the same charge, with the exception that the overt acts alleged were the dynamiting and burning of cattle dipping vats and spray pens, which had been sunk, built and erected in the County of Echols, State of Georgia, and were being used by said employees of the Bureau in the discharge of their duties as such employees, and that their duties involved the use of dipping vats and spray pens (R. 4-5). A demurrer to the indictment was filed, and the Court, after hearing argument, overruled the same (R. 5-11). The jury returned a verdict finding the six petitioners guilty (R. 11) and acquitting all of the others except two, and as to them a mistrial was declared (R. 12). As already stated, each of the defendants found guilty were given a six months' jail sentence (R. 12). A writ of error was granted (R. 57), and the judgment was affirmed by the Circuit Court of Appeals (R. 64-66).

The rulings and decisions complained of are:

(a) The refusal of the trial Court to sustain the demurrer filed and urged by the defendants to the indictment (R. 5-11).

(b) The admission in evidence by the Court, over objection of counsel for the defendants, of the contract between Peter F. Bahnsen, State Veterinarian for the State of Georgia, and A. D. Melvin, Chief of the Bureau of Animal Industry, in which they undertook to provide for a plan of co-operation between the Bureau and the State Veterinarian in the eradication of the cattle tick (R. 38-40).

(c) The correctness of certain instructions to the jury, upon which error is assigned (R. 53-54).

(d) The soundness of the opinion and judgment of the Circuit Court of Appeals affirming the judgment of the District Court (R. 64-66).

In 1910 the General Assembly of the State of Georgia passed an Act creating the office of State Veterinarian in the Department of Agriculture of the State of Georgia, and defining his duties. The Act was approved August 13th, 1910 (Ga. Laws, 1910, p. 125), and the relevant parts of it are set forth in the appendix to this brief and marked exhibit "A." By this Act the State Veterinarian was charged with the duty of investigating and taking proper measures for the control and suppression of all contagious and infectious diseases among domestic animals within the State, under such rules and regulations as might be promulgated by him and approved by the Commissioner of Agriculture for the State of Georgia, and he was required to assume charge of the work of cattle tick eradication in co-operation with the Federal authorities. In 1918 there was enacted by the General Assembly of Georgia an Act to provide for state-wide tick eradication (Ga. Laws, 1918, p. 526), which Act was approved August 17th, 1918. The relevant parts of said Act are set forth in the appendix and marked exhibit "B."

Under and by virtue of the Act of August 13th, 1910, Peter F. Bahnsen became State Veterinarian for the State

of Georgia, and on June 17th, 1915, entered into an agreement with the Chief of the Bureau of Animal Industry (R. 38-40), by which it was agreed that their departments should *co-operate in the work of tick eradication in Georgia.* This work was undertaken in Echols County in 1922, and met with a great deal of opposition on the part of the citizens of the county (Evidence Peter F. Bahnsen, R. 19-21). In August, 1922, all of the employees of the Bureau of Animal Industry whose names are set out in the indictment, except two, were carried into Echols County by Dr. S. J. Horne, a veterinarian of the United States Department of Agriculture, who had charge of the entire State, with headquarters in Atlanta (R. 14-16). These employees were stationed in an armed camp known as Camp McKinnon (Evidence R. S. English, R. 24-25). These employees of the Bureau, while in Camp McKinnon, assisted the State authorities in inspecting cattle on the range and guarding dipping vats, served dipping notices (requiring the owners of cattle under compulsion of the State law to dip their cattle every fourteen days), (Evidence R. S. English, R. 25), and "assisted the State men to enforce the law getting the cattle dipped" (Evidence J. C. Jeter, R. 23, and Roy S. Richey, R. 37). The Federal agents at Camp McKinnon were armed with forty-five revolvers and riot guns (R. 37). The six defendants, who were convicted, early in September, 1922, rode by the Camp in a Ford car and cursed the Government employees, and later during the same day returned and fired in the direction of the camp with a pistol, which fire was returned by the Federal employees with automatic rifles. No one was hurt in this fusillade (Evidence R. S. English, R. 24-25).

SPECIFICATION OF ERRORS ASSIGNED.

The first assignment of error (R. 57) challenges the correctness of the judgment of the Court overruling the demurrer to the indictment and each count thereof. The grounds of the demurrer to the first count of the indictment were:

"1. Because no crime against the laws of the United States is charged in said count against these defendants, or either of them.

"2. Because it appears from the allegations in said count that the duties with which the employees of the Bureau of Animal Industry whose names are set out therein were charged, and in the performance of which they are alleged to have been engaged at the time the several overt acts are alleged to have been committed, to wit: supervising of and causing to be dipped cattle, were not duties with which they were legally charged as such employees of the Bureau of Animal Industry, nor were they such duties as they could legally perform as such employees.

"3. Because in said count the defendants are charged with having conspired to commit an offense against the United States, and that, in furtherance of the conspiracy, they committed the various overt acts therein set forth for the purpose of deterring and preventing the alleged employees of the Bureau of Animal Industry of the United States Department of Agriculture from discharging their duties as such, to wit: causing cattle to be dipped for the purpose therein alleged, whereas, under the law, said alleged employees of the Bureau of Animal Industry were not charged with such duty and could not legally perform the same in the State of Georgia.

"4. Because there is no law vesting in said alleged employees of the Bureau of Animal Industry of the United States Department of Agriculture, as such, authority to perform the duties with which it is alleged they were charged, and in the performance of which it is alleged they were engaged at the time the several overt acts were committed for the purpose in said count set out.

"5. Because it is not alleged in said count that the State of Georgia ever accepted rules and regulations

for the suppression and extirpation of contagious, infectious and communicable diseases among live stock prepared by the Secretary of Agriculture and by him certified to the executive authority of said State, or that the plans and methods for the suppression and extirpation of said diseases heretofore adopted by the State of Georgia have been accepted by the Secretary of Agriculture. Nor is it alleged in said count that the Governor, or other properly constituted authority of the State of Georgia, has signified a readiness to co-operate for the extinction of any such disease, in conformity with the provisions of the Act of Congress of May 29th, 1884, entitled 'An Act for the Establishment of a Bureau of Animal Industry, etc.' (23 Stat., sec. 32, U. S. Comp. Stat., sec. 8691), and especially of section three thereof. Therefore, it is not shown by the allegations in said count that the alleged employees of the Bureau of Animal Industry had any right or authority to supervise the dipping of cattle, or to cause cattle to be dipped in said State, for the purpose in said count set out.

"6. Because said count of said indictment, and the matters and things therein set forth, do not show or state that the cattle, the dipping of which the employees of the Bureau of Animal Industry of the United States Department of Agriculture were supervising and causing to be done in order to prevent the spread of splenetic fever among cattle, and in order to eradicate and remove from them what is commonly known as the cattle fever tick, were subjects of interstate commerce, or that said cattle had in any way become subject to the supervision or control or power of Congress under the Constitution.

"7. Because the Act of Congress, approved May 29th, 1884, entitled 'An Act for the Establishment of a Bureau of Animal Industry, etc.,' under and by virtue of which the employees of the Bureau of Animal Industry of the United States Department of Agriculture are alleged to have been charged with the duty of supervising the dip-

ping of and causing to be dipped cattle, and under and by virtue of which said employees were supervising the dipping of and causing to be dipped cattle mentioned in said indictment, is unconstitutional, in that said Act, and especially section three thereof, attempts to give to the Secretary of Agriculture the authority to spend so much of the money appropriated by said Act as may be necessary in such investigations and in such disinfection and quarantine measures as may be necessary to prevent the spread of diseases, to wit: 'contagious, infectious and communicable diseases' among cattle from one state or territory into another, whereas, the State of Georgia did not delegate to the United States by the Constitution any right of supervision of or any power over the work of disinfection and quarantine of cattle within the State of Georgia, except when said cattle shall have, at any time, become subjects of interstate commerce, and said Act seeks to delegate to the Secretary of Agriculture, and through him to the employees of the Bureau of Animal Industry of the United States Department of Agriculture, rights, powers and duties, which were reserved to the states and to the State of Georgia and were not delegated as aforesaid to the United States or to the Congress thereof, or to any of the officers who derive their authority and exercise their offices and perform their duties under and by virtue of any law passed by the Congress of the United States.

"8. Because the Act of Congress, approved May 29th, 1884, entitled 'An Act for the Establishment of a Bureau of Animal Industry, etc.,' which Act, by section three thereof, gives to the Secretary of Agriculture authority to spend so much of the money appropriated by said Act as may be necessary in such investigations and in such disinfection and quarantine measures as may be necessary to prevent the spread of diseases, to wit: contagious, infectious and communicable diseases among cattle from one state or territory into another, does not vest in the Secretary of Agriculture of the United States, or

in the Bureau of Animal Industry mentioned in said count of said indictment authority to appoint agents and employees and to charge them with the duty of supervising and dipping and causing to be dipped cattle, and in order to eradicate and remove from tick infested areas what is commonly known as the cattle fever tick, and therefore the employees of the Bureau of Animal Industry of the United States Department of Agriculture named and mentioned in said count of said indictment were not, at the time mentioned in said count of said indictment when the defendants are alleged to have committed the offenses charged therein, officers or employees of the Bureau of Animal Industry of the United States Department of Agriculture, engaged in the execution of their duties as such legally delegated to them, nor were said acts of the defendants charged in said count of said indictment committed on account of the execution of their legally delegated duties."

The separate grounds of demurrer to the second count of the indictment are identical with those above quoted and urged to the first count, except there is an additional ground thereto, as follows:

"Because no duty with which the alleged employees of the Bureau of Animal Industry were legally charged required the use by them of dipping vats and spray pens."

The second assignment of error (R. 58) is upon the admission in evidence, over the defendants' objection, of the contract between the Chief of the Bureau of Animal Industry and the State Veterinarian, dated June 17th, 1915, which contract purports to provide for a plan of co-operation between the Bureau and the State Veterinarian for the eradication of the cattle tick in Georgia, said contract being, as we contend, erroneously admitted in evidence by the Court, (a) because the State Veterinarian was not authorized under the law to make any such contract with the Chief of the Bureau of Animal Industry; (b) because there is nothing in the indictment which charges that the work of tick eradication in Echols

County, Georgia, was proceeding under the Act of Congress of May 29th, 1884, at the time of the acts alleged to have been committed by the defendants, and there is nothing in said indictment which charges that there had been any contract or agreement between the State of Georgia, or any authority of the State, and the Department of Agriculture of the United States; and (c) because the Department of Agriculture of the State of Georgia has no authority under the law to make such a contract, and the employees of the Bureau of Animal Industry were not authorized under the law to perform the duties set forth in the contract, if it was made as appears from the memorandum of agreement admitted in evidence.

The third assignment of error (R. 58) is upon the following charge of the Court:

> "I have determined and so charge you that the employment of men by the Federal authorities, acting through the Department of Agriculture, in the enforcement of this dipping law, in co-operation with the authorities of the State of Georgia, is valid; so you need not concern yourselves further in this case with what you think one way or the other as to the wisdom of the law, the rightfulness of the law, or the constitutionality of the law. I charge you it is a valid law, and it is your duty to accept that as being correct."

Error is assigned, because (a) there is no authority of law for the Bureau of Animal Industry to engage in and carry on the work of dipping and disinfection of domestic cattle in the State of Georgia for the purpose of eradicating the cattle tick, in co-operation with the authorities of the State, or otherwise; and (b) the Federal officers and employees of the Bureau of Animal Industry have no authority to engage in the enforcement of the state-wide tick eradication law.

The fourth assignment of error (R. 59) is upon the following charge of the Court:

> "It could be shown to you, were it necessary to make a review of it, that from the beginning of the Act of Con-

gress of 1884, through the several Acts of the State of Georgia, under which this contract was made that has been introduced to you, that there has been manifested, not, gentlemen, an invasion of the rights of the State of Georgia, or its citizens on the part of the United States Government,—not that—and while this is not at all essential to the determination of the case, you will find throughout that there is a mutuality of evidence, and evidence on both sides, of an intention to have mutual co-operation; that the Federal employees were here acting under and by virtue of a contract made by the State of Georgia, through an officer who was in terms authorized by the State of Georgia to make such a contract—not the contract in terms, but a contract to carry that into effect. If, therefore, you believe that all or some of those named employees—these employees who are named in the indictment—engaged in the enforcement of the cattle dipping law, you will believe that they were lawfully engaged as employees or agents of the Government of the United States to this effect: 'whoever shall forcibly assault, resist, oppose, prevent, impede or interfere with any officer or employee of the Bureau of Animal Industry of the Department of Agriculture in the execution of his duties shall be punished as stated,' and 'whoever shall use any deadly or dangerous weapon in resisting any officer or employee of the Bureau of Animal Industry of the Department of Agriculture in the execution of his duties with the intent to commit bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties' shall be punished. Now that is the fundamental law upon which is applied the law of conspiracy, which is this: 'If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as stated in the statute'."

Error is assigned, because (a) the Federal employees named in the indictment were not lawfully charged as such with the enforcement of the State law, and (b) there is no authority of law for the Bureau of Animal Industry to engage in and carry on the work of dipping and disinfection of domestic cattle in the State of Georgia, for the purpose of eradicating the cattle tick, in co-operation with the authorities of the State, or otherwise.

The fifth assignment of error (R. 60) is upon the following instruction given by the Court to the jury:

> "Gentlemen, I charge you this: that the arrangement made between the United States through its Department of Agriculture and the State of Georgia made through its State Veterinarian, as set forth in this contract which has been introduced in evidence, and the employment of agents to carry that out, as indicated in the contract, is valid."

Error is assigned, because (a) the arrangement between the United States through its Department of Agriculture, and the State of Georgia, through its State Veterinarian, as set forth in the contract referred to, is as a matter of law invalid; and (b) the employment of agents to carry out said contract was without authority of law and illegal.

ARGUMENT AND AUTHORITIES.

It will be observed that the duties which the employees of the Bureau of Animal Industry named in the indictment were performing in Echols County, Georgia, were duties incident to the systematic work of disinfecting the cattle in that county, said work of disinfection being carried on under the supervision of and by compulsion of those employees, and consisting of the dipping and spraying of cattle, which were domestic property of the citizens of that county and which were in no way the subject of interstate commerce.

In order that the obvious errors in the judgment overruling the demurrer, in admitting in evidence the contract be-

tween the Chief of the Bureau of Animal Industry and the State Veterinarian of June 17th, 1915, and the instructions to the jury of which complaint is made, may be more clearly understood, it is perhaps well for us to call attention to certain parts of the evidence which show what work the employees of the Bureau of Animal Industry were engaged in in Echols County and what duties they were performing at the time it is alleged they were assaulted and interfered with.

S. J. Horne, a witness for the Government, testified (R. 16):

"I took into Echols County, early in August, 1922, all the employees of the Bureau of Animal Industry whose names are set out in the indictment except two * * * * * Lofton and Peterson, local parties, I think, were employed sometime in the spring of 1922 by the Bureau of Animal Industry. They were not on this job in August, at all. They were range riders and guarding vats. After these other gentlemen (the nine employees of the Bureau of Animal Industry mentioned in the indictment) came and the McKinnon vat could be constructed they were in the discharge of duties as range riders in Echols County. These men did not gather up cattle so much as they did supervising and dipping and making inspection of the range to see that they had all been dipped. On these inspections of the range, if they found one (meaning a cow) that wasn't paint marked, it was driven in by them.

"As the cattle were dipped they were marked with paint to distinguish between those that were dipped and those that were not. Seizure and impounding cattle was carried on in co-operation with the state inspector when it was found that they had not been dipped. It was carried on in connection with the two." Q. "They did the actual work of seizure?" A. "Yes, sir, they did, assisting with the other. I judge that they also at times performed the duties of notifying the owners of cattle when they were impounded."

T. H. Applewhite, a witness for the Government, testified (R. 18):

"The duties of these gentlemen named and described in this indictment as employees of the Bureau of Animal Industry were to assist the state employees in carrying on the work—they all did practically the same thing, more or less. * * * The range riders impounded the cattle which were found on the range that did not bear paint marks. These range riders included the employees of the Bureau of Animal Industry and the state men."

(R. 18-19) "It was in August, 1922, we carried these men (meaning the nine employees of the Bureau of Animal Industry) down there and established a camp called McKinnon camp, where the men lived in tents."

W. D. Counts, a witness for the Government, testified (R. 21):

"I was employed by the Government as an agent in tick eradication. My duties were to enforce the law. I was engaged in riding the range and looking after cattle which had not been dipped."

J. C. Jeter, a witness for the Government, testified (R. 24):

"The inspectors employed by the County Commissioners with the approval of Dr. Bahnsen and these government men whose names are set out in this indictment all performed the same duties. This batch of papers here are dipping notices signed and sent out by me. These notices were served by these government men as well as by the state men. Similar notices were sent to the cattle owners."

R. S. English, a witness for the Government, testified (R. 25):

"My duties were simply as a range rider to assist the state authorities in inspecting cattle on the range. I rode the range, inspected cattle and guarded dipping

vats. I also served dipping notices. My purpose in inspecting cattle on the range was to see that they had been dipped."

Roy S. Ritchey, a witness for the Government, testified (R. 37):

"There were some ten or twelve Bureau of Animal Industry men employed at Camp McKinnon. We had forty-five revolvers and also some riot guns. We had received instructions from Dr. Horne to use the guns only in self-defense. I was discharging the duties of a range rider and on the occasion of trips on the range we carried these revolvers."

On page 52 of the record there appears a dipping notice similar to the one served on the owners of cattle in Echols County by the employees of the Bureau of Animal Industry. This dipping notice is as follows:

"State of Georgia
Department of Agriculture
Bureau of Live Stock Industry
Dipping Notice

County: Echols. Original No. 79349.

Mr. D. D. Daniels. Address: Statenville, Ga.

Complying with the provisions of Sec. 4 of the Statewide Tick Eradication Act of 1918, you are hereby notified to have all of your cattle at McKinnon vat, dipping vat, for disinfection under official supervision on 24th day of August, 1922, and every fourteen days thereafter until further and otherwise notified. The law makes dipping compulsory. Should you fail to dip your cattle, the law provides that the cattle be dipped and quarantined at your expense. The law further provides that, if necessary, the cattle be sold to cover the cost incident to such quarantine and dipping. This 23rd day of August, 1922.

(Signed) J. C. JETER,
Cattle Inspector."

At Statenville, Ga.

From this evidence it appears that the nine named employees of the Bureau of Animal Industry, who it is alleged were discharging certain duties in Echols County and were interfered with in the discharge of such duties, established an armed camp in Echols County, Georgia. They served notices on the owners of cattle to bring their cattle to certain dipping vats and dip them. They marked with paint the cattle which were dipped. They rode the range and seized and impounded the cattle not so marked and did all of the work which the state law provides should be done in the systematic eradication of the cattle tick in Georgia. There was no shipment of cattle from Echols County. The cattle were not moved in or intended for interstate commerce, and that they were the subjects of such commerce is not even remotely suggested. The presence of the nine employees of the Bureau of Animal Industry in Echols County was solely for the purpose of enforcing the state tick eradication law.

Section 3 of the Act of Congress of May 29th, 1884, entitled "An Act for the establishment of a Bureau of Animal Industry to prevent the exportation of diseased cattle, and to provide means for the suppression and extirpation of pleuropneumonia and other contagious diseases among domestic animals," is the portion of the Act by virtue of which it is insisted by the Government that the employees of the Bureau were in Echols County and were engaged in the work of supervising the dipping of and causing to be dipped cattle, in order to prevent the spread of splenetic fever among cattle, and in order to eradicate from tick infested animals what is commonly known as the cattle fever tick. That section is as follows:

> "That it shall be the duty of the Commissioner of Agriculture to prepare such rules and regulations as he may deem necessary for the speedy and effectual suppression and extirpation of said diseases, and to certify such rules and regulations to the executive authority of each State and Territory, and invite said authorities to cooperate in the execution and enforcement of this act.

Whenever the plans and methods of the Commissioner of Agriculture shall be accepted by any State or Territory in which pleuro-pneumonia or other contagious, infectious, or communicable disease is declared to exist, or such State or Territory shall have adopted plans and methods for the suppression and extirpation of said diseases, and such plans and methods shall be accepted by the Commissioner of Agriculture, and whenever the governor of a State or other properly constituted authorities signify their readiness to co-operate for the extinction of any contagious, infectious, or communicable disease in conformity with the provisions of this act, the Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this act as may be necessary in such investigations, and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one State or Territory into another."

That section, when read in the light of the entire Act (Fed. Stat. Ann., 406), plainly has as its purpose co-operation with the State authorities on the part of the Bureau of Animal Industry in an advisory way, in so far as the work of extirpating the cattle tick from domestic animals is concerned. The Commissioner of Agriculture was charged with the duty of investigation, the compilation of statistics, and the ascertainment of the causes and the cures for contagious diseases among domestic animals, and with the duty of passing the information on to the State authorities. He was further charged with the duty of assisting the State authorities in an advisory capacity in the work of extirpating the cattle tick and other contagious diseases among domestic animals. So long as a contagious disease was confined to the cattle of one particular State, and the work to be done was simply the extirpation of the cattle tick with which domestic cattle of that State were infested, this Act and all other Acts of Congress could give no authority to the employees of the Bureau of Animal Industry to engage in the work of supervising the dipping of and causing cattle to be dipped. To do so would

be a palpable invasion of the rights of the states, and the employees of the Bureau would be engaged in a work which was peculiarly within the scope of the duties of the State agents.

Sec. 3, quoted above, provides that the Commissioner of Agriculture shall prepare rules and regulations as his investigation indicates will be effective for the suppression and extirpation of infectious and contagious diseases among cattle, and he is charged with the duty of certifying these rules and regulations to the executive authorities of the states, and of inviting the executive authorities to co-operate in the enforcement and execution of these rules. It also provides that when the plans of the Commissinoer shall have been accepted by any particular State, or when any particular State formulates plans of its own and such plans and methods are acceptable to him, and the Governor of the State signifies his willingness to co-operate with the Commissioner for the extirpation of any contagious disease among cattle, the said "*Commissioner of Agriculture is hereby authorized to expend so much of the money appropriated by this Act as may be necessary in such investigation and in such disinfection and quarantine measures as may be necessary to prevent the spread of the disease from one state or territory into another.*" The legislative intent is clearly indicated by the last few words of the section. The Commissioner of Agriculture was authorized to spend the money on a thorough investigation of the causes and cures of contagious diseases among cattle. He was, however, authorized to spend said appropriation in measures of disinfection and quarantine only when a disease was to be confined within any particular State. If, upon investigation, a contagious, infectious or communicable disease among live stock is found to exist in a State, or some part thereof, the Secretary of Agriculture of the United States may quarantine the infested territory and prevent the interstate movement of diseased animals only upon compliance with such rules and regulations as he may prescribe, but he can not legally engage in the work of dipping and disinfecting animals while confined to a particular State. It is

only when such animals are moving, or offered for movement, from one state or territory into another that he, through the agents and representatives of his department, can lawfully engage in the work of dipping and disinfection.

Section 5 of the Act approved March 3rd, 1905, entitled "An Act to enable the Secretary of Agriculture to establish and maintain quarantine districts, to permit and regulate the movement of cattle and other live stock therefrom, and for other purposes," (Penal Code, sec. 62, U. S. Comp. Stat., sec. 10230) provides:

> "That every person who forcibly assaults, resists, opposes, prevents, impedes, or interferes with any officer or employee of the Bureau of Animal Industry of the United States Department of Agriculture in the execution of his duties, or on account of the execution of his duties, shall be fined not less than one hundred dollars nor more than one thousand dollars, or be imprisoned not less than one month nor more than one year, or by both such fine and imprisonment; and every person who discharges any deadly weapon at any officer or employee of the Bureau of Animal Industry of the United States Department of Agriculture, or uses any dangerous or deadly weapon in resisting him in the execution of his duties, with intent to commit a bodily injury upon him or to deter or prevent him from discharging his duties, or on account of the performance of his duties, shall, upon conviction, be imprisoned at hard labor for a term not more than five years or fined not to exceed one thousand dollars."

Thus a penalty for any interference with any officer or employee of the Bureau of Animal Industry *in the execution of his duties, or on account of the execution of his duties*, was imposed. It was under section 3 of the Act of May 29th, 1884, and section 5 of the Act of March 3rd, 1905, that the defendants were indicted and tried, and the very essence of the offense is the charge that the employees of the Bureau of Animal Industry who were interfered with were, at the time of said interference, lawfully engaged in a duty with which

they were lawfully charged, and that duty in which they were engaged was, according to the allegations of the indictment, the supervising the dipping of and causing to be dipped cattle in Echols County. Not one word in the indictment indicates that the work they were doing was necessary to prevent the spread of contagious diseases from one State to another. The indictment does not charge that the cattle which were being dipped had become the subjects of, or were even intended for interstate commerce.

It would appear from one of the allegations in the indictment that the Federal agents who had organized Camp McKinnon, in the heart of Echols County, were engaged in the dipping of, and were by compulsion causing the citizens of the county to dip their cattle, not for the purpose, in so far as the indictment discloses, of preventing the spread of disease from one State to another, but, according to the allegations made, to prevent the spread of splenetic fever among cattle,—that is, among cattle in Echols County, and, as the indictment further alleged "in order to eradicate and remove from tick infested animals what is commonly known as the cattle fever tick." There is nothing in the Act establishing the Bureau of Animal Industry which charges the employees of the Bureau with the performance of the duties which the indictment alleged they were engaged in at the time the overt acts are alleged to have been committed. If said employees were in Echols County using compulsion and force (and the word "causing" implies that) to require the citizens of that county to dip their cattle, they were engaged in the work of usurpation of authority and of tyranny, and it was not the intention of Congress in passing the Act of March 3rd, 1905 to *penalize the lawful resistance to the exercise of unlawful authority.* If, by the Act of May 29th, 1884, establishing the Bureau of Animal Industry, it was the intention of Congress to confer upon the Secretary of Agriculture authority to send agents and employees of the Bureau into the borders of any State in the Union and empower them to supervise the dipping and by compulsion and force cause domestic cattle to be dipped, the Act must be held unconstitutional and

void. In this connection we respectfully ask a careful c
sideration of the following authorities which are, in our op
ion, controlling upon that question.

128 U. S. 1, Kidd vs. Pearson.

85 Fed. 425, U. S. vs. Boyer.

154 U. S. 210, Covington, etc., Bridge Co. vs. K
tucky.

10 Wall. 557, In re: The Daniel Ball.

116 U. S. 517, Coe vs. Errol.

52 Fed. 113, In re: Greene.

9 Wheat. 1, Gibbons vs. Ogden.

In Kidd vs. Pearson, 128 U. S. 1, supra, Mr. Justice Lam
said:

"No distinction is more popular to the common mind
or more clearly expressed in economic and political litera
ture, than that between manufactures and commerce
Manufacture is transformation,— the fashioning of raw
materials into a change of form for use. The buying and
selling and the transportation incidental thereto consti
tute commerce; and the regulation of commerce in the
constitutional sense embraces the regulation, at least, o
such transportation. The legal definition of the term as
given by this court in County of Mobile vs. Kimball, 10
U. S. 691, 702, is as follows: 'Commerce with foreign
nations and among the states, strictly considered, con
sist in intercourse and traffic, including in these terms
navigation and the transportation and transit of persons
and property, as well as the purchase, sale and exchange
of commodities.' If it be held that the term includes the
regulation of all such manufactures as are intended to be
the subject of commercial transactions in the future, it is
impossible to deny that it would also include all produc
tive industries that contemplate the same thing. The re
sult would be that congress would be invested, to the ex
clusion of the states, with the power to regulate, no

only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining—in short, every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat grower of the Northwest, and the cotton planter of the South, plant, cultivate and harvest his crop with an eye on the prices at Liverpool, New York and Chicago? The power being vested in Congress, and denied to the states, it would follow as an inevitable result, that the duty would devolve on Congress to regulate all of these delicate, multiform and vital interests—interests which in their nature are, and must be, local in all the details of their successful management. It is not necessary to enlarge on, but only to suggest, the impracticability of such a scheme, when we regard the multitudinous affairs involved and the almost infinite variety of their minute details."

While the decision in United States vs. Boyer, supra, was by a District Judge, it is quite evident that the learned jurist who decided that case made a careful study of the question there presented and which is directly involved in the instant case. He concluded: (a) That the crime of bribery could not be predicated upon the offer of a reward not to perform duties for the performance of which there was no legal or constitutional warrant; and (b) That the killing of cattle and the preparation of their carcasses for shipment in interstate commerce was not interstate commerce, and that the employees of the Bureau of Animal Industry engaged in the work of inspecting cattle which had been slaughtered and were being packed preparatory to being shipped in interstate commerce were not engaged in the performance of duties of inspection legally conferred upon them, and that the Act of Congress found in 1st Supp. Rev. Stat. 937, and 2nd Supp. Rev. Stat. 403, whereby the Secretary of Agriculture was empowered to have made a careful inspection of cattle, sheep and hogs at slaughter houses located in the several states, which were about to be slaughtered, the products of which

were intended for sale in other states or foreign countries, was unconstitutional.

> "The buying of grain within a State for shipment to markets in other States constitutes interstate commerce *if followed by shipments into other States.*" (Italics ours.)
>
> Sup. Ct. Advance Opinions, June 1, 1925, 554, Shafer vs. Farmers Grain Co.

We take it that no one will seriously contend that the power claimed in the instant case was conferred upon Congress by the general welfare clause of the Constitution, because it contains no power of itself to enact any legislation, but according to the most liberal view is only a limitation on the taxing power of the United States. Does the power then "to regulate commerce with foreign nations and among the several states and with the Indian tribes" embrace the power to send inspectors within a state to supervise the dipping of and cause cattle to be dipped when they are not subjects of interstate commerce, or intended for interstate commerce? Most assuredly not.

> 85 Fed. 425, U. S. vs. Boyer.

If it was the intention of Congress to confer, by the Act of May 29th, 1884, authority upon the agents and employees of the Bureau of Animal Industry to go within the borders of a state and supervise the dipping of and cause cattle to be dipped, irrespective of whether or not they were the subjects of interstate commerce, the Act is void. In Illinois Central Railroad Co. vs. McKendree, 203 U. S. 514 (51 L. Ed. 298), it was held:

> "Quarantine regulations promulgated by the Secretary of Agriculture acting under cover of the Act of February 2, 1903, entitled 'An Act to Enable the Secretary of Agriculture to More Effectually Suppress and Prevent the Spread of Contagious and Infectious Diseases of Live Stock, and for Other Purposes,' are void as in excess of

the powers conferred by that act, where, on their face, they apply as well to intrastate as to interstate commerce."

The game laws enacted by Congress for the protection of migratory birds were declared unconstitutional on the theory that game within the borders of a state is domestic property.

214 Fed. 154, U. S. vs. Shauver.

221 Fed. 288, U. S. vs. McCullagh.

The Federal Employers Liability Act was declared unconstitutional because Congress had no power to regulate matters purely intrastate.

207 U. S. 463, Howard vs. Illinois Central R. Co.

Decisions of this Court declaring the Civil Rights Act unconstitutional have a direct bearing upon the questions here involved.

109 U. S. 3, Roberson vs. Memphis, etc. R. Co.

230 U. S. 125, Butts vs. Merchants & Miners Trans. Co.

The Federal Futures Trading Act was declared unconstitutional because there was no limitation of the application of the tax to interstate commerce.

259 U. S. 44, Hill vs. Wallace.

It is a fundamental principle that the legislative powers of Congress are limited by constitutional grants of the States, and that all governmental powers which are not conferred upon the United States by the Constitution are reserved to the States.

In Linder vs. United States, Supreme Court Advance Opinions May 1, 1925, 489, this Court held:

"Congress can not, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal Government.

"Any provision of an Act of Congress ostensibly enacted under power granted by the Constitution, not naturally or reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within the power reserved to the States, is invalid, and can not be enforced."

In Briscoe vs. Bank of Kentucky, 11 Peters, 257 (9 L. Ed. 709), it was held:

"All powers not delegated to the Federal Government or inhibited to the States in the Federal Constitution are reserved to the States or the people."

To the same effect is,

1 Wheat. 304 (4 L. Ed. 97), Martin vs. Hunter.

"Every State possesses exclusive jurisdiction and sovereignty over person and property within its territory."

95 U. S. 714 (24 L. Ed. 565), Pennoyer vs. Neff.

"Sovereignty is with the people, not with any agency of the Government."

Watson on the Constitution, p. 1250.

"No compact between a State and the United States can enlarge or diminish constitutional rights."

3 How. 212 (11 L. Ed. 565), Pollard vs. Hogan.

"All those powers which relate to municipal litigation, or which may more properly be called internal police, are not surrendered or restrained; and, consequently, in relation to these, the authority of the State is complete, unqualified and exclusive."

11 Pet. 102 (97 L. Ed. 648), Mayor, etc. of New York vs. Miln.

"The Legislature of a State possesses only those at-

tributes of sovereignty which have been delegated to it by the people of a State and its Constitution."

11 Pet. 420 (9 L. Ed. 773), Charles River Bridge vs. Warren Bridge.

3 Dall. 386 (1 L. Ed. 648), Calder vs. Bull.

16 Wall. 667 (21 L. Ed. 375), Chicago B. & Q. R. Co. vs. Otoe Co.

6 Cranch 87 (31 L. Ed. 162), Fletcher vs. Peak.

In the light of these authorities it seems quite clear that Congress did not have the power to confer upon the Commissioner of Agriculture authority to send agents of the Bureau of Animal Industry into a State and engage in the work of dipping and disinfection of domestic cattle, and if such was the intention of Congress, the Act of May 29th, 1884, establishing the Bureau is unconstitutional. And since "no compact between a State and the United States can enlarge or diminish constitutional rights," such authority can not be claimed under the agreement between the Chief of the Bureau and the State Veterinarian, entered into on June 17th, 1915.

Domestic cattle within the State of Georgia, feeding upon the ranges and farms of their owners, are domestic property. In the indictment it is alleged that the employees of the Bureau of Animal Industry were in Echols County engaged in the work of "supervising the dipping of and causing to be dipped cattle." The compulsion which they were exercising by virtue of their assumed authority seems to have caused resentment and resistance on the part of the citizens. This resistance, which flared up into overt acts, constitute alleged violations of section 62 of the Penal Code. To be said to be in performance of their duties as such employees is equivalent to saying that their presence in Echols County and the compulsion they were exercising upon the citizens thereof was by virtue of authority vested in them as Federal employees, and yet at the time of the commission of the overt acts they were operating under and by virtue of the authority vested in them as agents of the State of Georgia, and the resistance

of the citizens was resistance to the authority of the State in the enforcement of the State-wide Tick Eradication Act, approved August 17th, 1918. A study of that Act and an examination of the evidence will show that the duties, in the performance of which the agents of the Bureau of Animal Industry were engaged at all of the times mentioned and referred to in the indictment and shown by the evidence, were duties expressly conferred upon State inspectors and with which they were charged by the State law, and not duties with which they were charged as employees of the Bureau of Animal Industry.

But if the Act of May 29th, 1884, is susceptible of two constructions, by one of which it may be held constitutional and valid, and by the other it must be held unconstitutional and void, it is the duty of the courts to place upon it that construction which will uphold it.

In Linder vs. United States, supra, this Court held:

> "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

In our opinion the only construction that can be given the Act of May 29th, 1884, which will avoid the conclusion that it is unconstitutional is that it does not confer upon the Secretary of Agriculture the right to place armed agents within the borders of a State for the purpose of carrying on the work of dipping and disinfecting domestic cattle not moving in, or intended for interstate commerce. The Act itself, properly construed, does not give to such employees any authority to enforce the disinfection and quarantine measures except where animals are subjects of interstate commerce.

47 Fed. 833, U. S. vs. Gibson.

The only question that remains is whether or not the allegations of the indictment were sufficient to bring it within the provisions of the Act of May 29th, 1884, to which we have so often referred.

In the case of The Abby Dodge vs. United States, 223 U. S. 166 (4), it was held:

> "A libel charging a vessel with violating the Act of June 20th, 1906, by landing at a Florida port sponges taken by means of diving or diving apparatus from the waters of the Gulf of Mexico, or Straits of Florida, must negative the fact that the sponges may have been taken from waters within the territorial limits of a state."

See also:

195 Fed. 980, U. S. vs. Birdsall.

48 Fed. 554, U. S. vs. Baird.

267 Fed. 603, U. S. vs. Pittoto.

271 Fed. 795, U. S. vs. Hallowell.

277 Fed. 459, U. S. vs. Page et al.

There is no allegation in the indictment that any rules and regulations prepared by the Secretary of Agriculture of the United States for the suppression and extirpation of infectious, contagious and communicable diseases among live stock had been certified to the executive authority of the State of Georgia and accepted, or that the plans and methods adopted by the State of Georgia (Ga. Laws 1918, p. 256) for that purpose had been accepted by the Secretary of Agriculture of the United States. Therefore, the indictment did not show any authority in the employees of the Bureau of Animal Industry to engage or participate in the work of systematic tick eradication in Georgia.

The Circuit Court of Appeals affirmed the judgment of conviction on the theory that inasmuch as the County of Echols, in which the employees of the Bureau of Animal Industry were alleged to be engaged, is a border county bounded on the south by a county in Forida, "the supervision of the cattle complained of had a direct tendency to prevent the spread of disease into another State." If the acts of the agents and employees of the Bureau of Animal Industry can be declared to be legal on any such theory, it could as plausibly

be contended that they could enter a county in the center of Georgia and exercise the same authority, on the theory that the cattle in that county would have a direct tendency to communicate a contagious disease to the cattle of an adjoining county, and that it would spread from county to county until it reached the State line. If such is the law of this country, the citizens can not longer boast of State rights, in so far as domestic property is concerned. Surely Congress had no such thing in mind.

We call attention to the further fact that in rendering the decision complained of, the Circuit Court of Appeals assumed that the county in Florida adjacent to Echols County was tick free, when in point of fact it was not. That Court could not take judicial cognizance of a fact which did not exist.

In conclusion we urge and insist upon all of the assignments of error, and respectfully submit that the demurrer was improperly overruled, that the contract between the State Veterinarian and the Chief of the Bureau of Animal Industry of June 17th, 1915, was improperly admitted in evidence, and that the instructions complained of embodied incorrect principles of law and were erroneous. For all of these reasons the defendants convicted are entitled to a reversal of the judgment.

Respectfully submitted,

John W. Bennett,
Omer W. Franklin,
L. W. Branch,
E. K. Wilcox,

Attorneys for Petitioners.

Of Counsel:
Omer W. Franklin,
E. K. Wilcox,
Harley Langdale,
T. G. Connell,
Valdosta, Ga.
John W. Bennett,
Waycross, Ga.
L. W. Branch,
Russell Snow,
Quitman, Ga.

APPENDIX.

Exhibit "A."

Relevant Parts of Act of General Assembly of Georgia, creating the Office of State Veterinarian and defining his Powers (Ga. Laws 1910, p. 125).

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by the power of the same, That the office of State Veterinarian in the Georgia State Department of Agriculture be, and is hereby created, and that the Commissioner of Agriculture be, and is hereby authorized to appoint a competent and qualified Veterinarian (who must receive the endorsement of the Georgia State Board of Veterinary Examiners) to fill this position under the title of "State Veterinarian," such officer to continue in office during good behavior and the proper performance of his duties.

Sec. 2. Be it further enacted by the authority aforesaid, That the duties of the State Veterinarian shall be to investigate and take proper measures for the control and suppression of all contagious and infectious diseases among the domesticated animals within the State, under such rules and regulations as may be promulgated by him and approved by the Commissioner of Agriculture of Georgia; he shall assume charge of the work of cattle tick eradication in co-operation with the Federal authorities and shall devote his whole time to the improvement of the live stock industry of the State, and he shall make report upon his work annually, the same to be published in the annual report of the Commissioner of Agriculture.

Sec. 3. Be it further enacted by the authority aforesaid, That the salary of said State Veterinarian shall be twenty-five hundred dollars per annum ($2,500.00), and he shall in addition be reimbursed his actual traveling expenses incurred while traveling in the service of the State in the regular discharge of his duties.

Exhibit "B."

Relevant Parts State-wide Tick Eradication Act (Ga. Laws, 1918, p. 526).

Section 1. Be it enacted by the General Assembly of the State of Georgia, and it is hereby enacted by the authority of the same, That from and after the passage of this Act, the movement of cattle infested with the cattle fever tick (margaropus annulatus) into, within or through the State of Georgia at any time or for any purpose, except as hereinafter provided, shall be and the same is hereby prohibited.

Sec. 2. Be it further enacted that on or before the first day of April, 1919, the ordinary, county commissioners or officers in charge of the county affairs in each and every county where tick eradication has not been completed, shall construct such number of dipping vats as may be fixed by the State Veterinarian, or his authority, and provide the proper chemicals and other materials necessary to be used in the systematic work of tick eradiction in such counties, which shall begin on said date or such subsequent date as may be fixed by the State Veterinarian, with the approval of the Commissioner of Agriculture. If the ordinary, county commissioners or officials in charge of county affairs of any county shall fail or refuse or neglect to comply with the provisions of this Act on or before the first day of April, 1919, the State Veterinarian shall apply to any court of competent jurisdiction for writ of mandamus, or shall institute other legal proceedings as may be necessary and proper to compel such official to comply with the provisions of this Act.

Sec. 3. Be it further enacted, That the several counties shall provide and pay the salaries of the necessary number of local county inspectors, or agents, to assist in this work, who shall be appointed by the county officials in charge of county affairs, subject to the approval of the State Veterinarian, and commissioned by him; the salaries of said inspectors shall be fixed by the county authorities, and shall be sufficient to insure the employment of competent men. The State Veterinarian shall be empowered to employ at last one State Inspec-

tor, whose duty it shall be to inspect the work of county inspectors, or to do any special work at any time and place when directed, by the State Veterinarian, and who shall be paid by the funds appropriated by the State of Georgia for the work of tick eradication.

Sec. 4. Be it further enacted, That cattle, horses, or mules infested with cattle ticks or exposed to tick infestation, the owner or owners of which, after thirty days' written notice from a local or State inspector shall fail or refuse to dip such animals regularly every fourteen days in a vat properly charged with arsenical solution, as recommended by the United States Bureau of Animal Industry, under the supervision of the local inspector in charge of tick eradication, shall be placed in quarantine and dipped and cared for at the expense of the owner by the local inspector. Quarantine and dipping notice for cattle, horses or mules, the owner or owners of which can not be found, shall be served by posting copy of such notice in not less than three public places within the county, one of which shall be at the county court house. Such posting of quarantine notice shall be due and legal notice. It shall be the duty of the sheriff of any county in which the work of tick eradication is in progress to render said inspector any assistance necessary in the enforcement of this Act. Any expense incurred in the enforcement of this provision shall be constituted a lien upon any animals so quarantined; and should the owner fail or refuse to pay said expense after three days' notice, the animals shall be disposed of as provided by section 2034 of the Civil Code of Georgia, so far as said section refers to advertising and other proceedings to sell. The proceeds of said sale shall be applied to the payment of legal costs, including the expense of advertising, fee and expense of quarantine and dipping or disinfecting said animals, and the balance shall be paid to the owner, if known, and if unknown, shall, at the expiration of ninety days from the date of sale, if no legal claim has been established to same, be applied and paid into the tick eradication fund of the county; provided further, that the lien herein created shall be superior to all liens, except liens for taxes.

Sec. 5. Be it further enacted by the authority aforesaid, That any person moving any cattle infested with fever ticks into or within or through any county of this State, except upon his own premises for the purpose of slaughter, or for the purpose of taking same to a vat for the purpose of dipping, and any inspector who shall knowingly permit any cattle, horses or mules to be kept in the territory for which he shall be appointed, or any person who shall own or keep any cattle, horses or mules infected with fever ticks in any county of this State, after notice, as provided in Section 4 of this Act, shall be guilty of a misdemeanor and shall be punished as provided in Section 1065 of Volume 2, of the Code of 1910; and that all fines paid under the provisions of this section, after the payment of actual court costs, shall be paid to the proper county authorities and become a part of the fund to be used for tick eradication in said county.

Sec. 6. Be it further enacted by the authority aforesaid, That nothing contained in this Act shall be construed as affecting any rule or regulation heretofore or hereafter passed by the Department of Agriculture governing tick eradication in Georgia. This Act shall not go into effect until December 31st, 1919.

I, E. K. Wilcox, of counsel for the Petitioners, hereby certify that I have this day sent by United States registered mail a copy of the above and foregoing brief to Hon. F. G. Boatright, United States Attorney for the Southern District of Georgia, and that I have also sent a copy thereof by United States registered mail to Hon. John P. Sargent, the Attorney-General of the United States.

Dated at Valdosta, Georgia, this February 20, 1926.

E. K. Wilcox